



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2004

Mr. Gary Allmon Grimes
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120 West Main, Suite 201
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OR2004-4095

Dear Mr. Grimes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201488.

The Mesquite Independent School District (the "district"), which you represent, received a request for eleven categories of information concerning the district's girls basketball program. The information requested includes information regarding complaints or lawsuits involving the district or the girls basketball program; disciplinary action against coaches; financial information, including bank account information, records of funds disbursed to the program, and expense records of a trip to a tournament in San Antonio; district policy information; and photographs, videotapes, or other records of an incident at a game in January. You state that the district does not possess information responsive to some of the items of the request. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We understand you to represent that the district intends to release some responsive information to the requestor. However, you claim that personally identifiable student and parent information is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. You also indicate that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments

submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a preliminary matter, you contend that the request at issue was not a valid request under the Act because the request was delivered to the principal of Poteet High School, rather than sent directly to the district superintendent. *See* Educ. Code § 11.201(a) (superintendent is chief executive officer of school district); Gov't Code § 552.201(a) (chief administrative officer of governmental body is officer for public information). Generally, a request for public information need not be addressed to the officer of public information of a governmental body to be a valid request under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974); *see also* Gov't Code § 552.202 (each department head of governmental body is an agent of officer for public information for purposes of receiving requests under Act). The Act requires a request to be reasonably identifiable as a request for public records. *See* Open Records Decision No. 497 (1988). You cite section 552.301(c) of the Government Code in support of your claim that "a request for information must be addressed directly to the officer for public information;" we note that section 552.301(c) provides only that a requestor who transmits a request for public records by fax or e-mail must address the request to the officer for public information or the officer's designee. Gov't Code § 552.301(c). Section 552.301(c) does not require that a written request not sent by fax or e-mail, that is reasonably identifiable as a request for public information, be addressed to the officer for public information. You have submitted an affidavit from the high school principal attesting that the requestor hand-delivered the present request to the principal. We determine that the request at issue was properly delivered to the district and is a valid request for information under the Act. Thus, we determine that the district is obligated to respond to the request as provided under the Act.

We next address your claimed exceptions to disclosure. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. You indicate that some responsive information the district intends to release contains information identifying district students and parents that is confidential pursuant to FERPA. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in

conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995). FERPA protects information to the extent "reasonable and necessary to avoid personally identifying a particular student," or "one or both parents of such a student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995). In this instance, as you have submitted information that you contend is confidential under FERPA, we address the applicability of FERPA to the information.

Upon review, we agree that the submitted documents include education records that contain information identifying particular district students and parents. Thus, we agree that information in the submitted documents that personally identifies students and parents is generally confidential under FERPA. In this case, the submitted documents reflect that the present requestor is associated with the district girls basketball program at issue and knows the identities of students identified in the documents. We therefore find that withholding only the names of these students would not suffice to avoid the release of personally identifiable information contained in student education records as mandated by FERPA. Accordingly, we have marked the information in the submitted documents that the district must withhold pursuant to FERPA.

We further note, however, that the requestor may have a right of access under FERPA to certain student information in the submitted documents, in the event such information consists of education records of the requestor's child. Under FERPA, a student's parents have an affirmative right of access to their child's education records, although this right does

not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). The documents indicate that a portion of the information at issue may pertain to the requestor's child. We therefore determine that, in the event the district determines that the submitted documents contain education records of the requestor's child, the requestor has the right under FERPA to inspect and review or be informed of such information. However, information pertaining to other students in such records must be withheld under FERPA. We have marked the portion of the submitted information that may pertain to the requestor's child.

Next, you indicate that the information in Appendix 3 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.¹ Section 21.355 provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also determined that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. *Id.* You indicate that Appendix 3 consists of an evaluation of a district coach, who is a teacher as contemplated in Open Records Decision No. 643. Upon review of the information, we agree that a portion of Appendix 3 consists of evaluations. Thus, provided the employee at issue was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, we find the district must withhold the information we have marked in Appendix 3 under section 552.101 in conjunction with section 21.355 of the Education Code. The remainder of Appendix 3, however, does not consist of the type of records made confidential by section 21.355. We therefore determine that the district may not withhold any of the remaining submitted information pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

You also contend that a letter dated March 9, 2004 contained in Appendix 3 is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under

¹ You appear to indicate that additional portions of the responsive information may be confidential under section 21.355. To the extent the district contends that any of the submitted information is confidential under section 21.355, the following discussion shall apply to the information.

the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Accordingly, we consider your claim under section 552.102(a) for the letter at issue in the context of the doctrine of common-law privacy under section 552.101 of the Government Code.

Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

The information you seek to withhold under section 552.102(a) relates solely to the work conduct and job performance of a district employee, and is therefore subject to a legitimate public interest. *See Open Records Decision Nos.* 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, based on our review of the information, we determine that the letter at issue is not excepted from disclosure under section 552.102(a) of the Government Code.

You next contend that a portion of the submitted information responsive to the item of the request regarding civil rights complaints against the district is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* The information submitted as Appendix 11 consists of complaints filed with the Equal Employment Opportunity Commission (“EEOC”) alleging civil rights violations by the district. You inform us that the submitted EEOC complaint dated January 14, 2004, is still pending and under investigation. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). We therefore find that you have established that the district reasonably anticipates litigation with respect to this complaint. We also find that the January 14, 2004 complaint is necessarily related to the anticipated litigation. Thus, we find that the January 14, 2004 complaint is excepted from disclosure under section 552.103 at this time.² We note, however, that the remaining information in Appendix 11 is not excepted under section 552.103 and may not be withheld on that basis.

Finally, we note that the submitted documents contain account number information that is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

² We note, however, that once information has been obtained by all parties to litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, in the event the January 14, 2004 complaint is obtained from or provided to all opposing parties in the anticipated litigation, the complaint is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

- (1) obtain money, goods, services, or another thing of value; or
 - (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
- (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The district must withhold the account number information that we have marked pursuant to section 552.136 of the Government Code.

In summary, we have marked information in the submitted documents that the district must withhold pursuant to FERPA. We have also marked information to which the requestor may have a right of access under FERPA, in the event the district determines that this information constitutes education records of the requestor's child. We have marked evaluation information in Appendix 3 that is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. We have also marked the EEOC complaint in Appendix 11 that is excepted under section 552.103 of the Government Code and may be withheld. We have marked account number information that must be withheld pursuant to section 552.136 of the Government Code. The district must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records


will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 201488

Enc: Submitted documents

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(w/o enclosures)